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IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Appeal No. 351 of 2005

(Appeal against the judgment and order, dated 09.05.2005, passed by Shri A. K. Jain, Addl. District & Sessions Judge, Siwan in Title Appeal No. 67 of 1991)

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Swami Nath Bhagat, son of Late Nand Kumar Bhagat, Resident of village : Gothi, Police Station: Darauli, at present : Ander, P.O.: Banthu Shri Ram, Pargana: Ander, District - Siwan

.... Appellant/s

Versus

1. Vishwanath Bhagat, son of Late Ram Prit Bhagat, Resident of village : Gothi, Pragna: Ander, P.S. – Darauli at present Ander, P.O. : Banth Shri Ram, District – Siwan.

..... Defendant / Appellant in court below
Respondent (1st set)

2. Shashi Bhushan
3. Ravi Bhushan
4. Binda Kumari
5. Kusum Kumari
6. Vidyawati Kumari

All 2 to 6 are sons and daughters of Swaminath Bhagat, Resident of village: Gothi, P.S. Ander, P.O. Banthu Shri Ram, District – Siwan

7. Satydeo Bhagat
8. Daroga Bhagat
9. Laxman Bhagat
10. Kailash Bhagat
11. Harendra Bhagat
12. Laxmina Devi
13. Kalawati Devi
14. Durgawati Devi

All 7 to 14 are sons and daughters of Late Mohar Bhagat, Resident of village: Gothi, P.S. – Ander, P.O.: Banthu Shri Ram, District – Siwan

15. Prabhu Nath Bhagat
16. Paresh Bhagat
17. Bishram Bhagat
18. Sushil Devi

All 15 to 18 are sons and daughters of Kanhai Bhagat, Resident of village: Gothi, P.S. – Ander, P.O.: Banthu Shri Ram, District – Siwan

..... Respondents in the court below
Respondent (2nd Set)

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Appearance :
For the Appellant/s : Mr. SUDHIR RANJAN
For the Respondent/s : Mr. SANJAY KUMAR SINGH

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CORAM: HONOURABLE MR. JUSTICE AJAY KUMAR TRIPATHI

ORAL JUDGMENT
Date: 06-07-2012

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Heard learned counsel for the appellant and learned counsel for the respondents.

Miscellaneous Appeal arises out of the order passed by the 6th Additional District & Sessions Judge, Siwan in Title Appeal No. 67 of 1991, decided on 09.05.2005. By virtue of this decision, the judgment and decree of the trial court, passed in Title Suit No. 68 of 1984, dated 11.10.1991 and 19.10.1991, respectively, has been set aside and the matter remanded for retrial with formulation of two additional issues, which the lower appellate court was of the opinion, was required to be answered.

Counsel representing the appellants submits that the lower appellate court committed complete breach of principle of law in setting aside the judgment of the trial court and remanding the matter after so many years, when the lower appellate court itself had the requisite powers and jurisdiction, if it was of the opinion that certain issues were required to be framed and answered or decided. This emerges from the provisions of the CPC, contained in order 41, rule 23 to 26. Such power has also been held to be valid power even by the Apex Court in the much celebrated decision in the case of ***Ashwin Kumar K. Patel Vrs. Upendra J. Patel, reported in AIR 1999 Supreem Court 1125***.

The submission of the counsel is based on the fact that the suit was filed not only for partition or the share of the property of Dharmoo Bhagat but also one Most. Palti, who happened to be wife of Bujhawan Mahto, but had remarried after the death of Bujhawan Mahto with one Lalsa, since Lalsa and Palti also died without any

legal heir, then the property of Palti, which was given to her to the extent of 1 Bigha and 10 Katha of land by virtue of a compromise many-many years ago would also devolve on of the family. Since all the properties in dispute are ancestral properties, therefore, the plaintiff appellant had a right to demand his share.

It is also contended that the lower appellate court had committed serious error, because in a matter of joint family or matter of inheritance from joint family, nobody can claim adverse possession of any property.

If that be so, then the opinion expressed by the lower appellate court that whether defendants / respondents had acquired a right of adverse possessions, seems to be contrary to established principles of Hindu Law. Whether Most. Palti died soon after revisional survey done in or around 1934 is also one of the issues which could have been very well found by the lower appellate court with little exercise and this did not require remanding the matter after setting aside the entire judgment, when no fault has been found with regard to rest of the findings.

Counsel for the appellant seems to be correct on both the counts. In addition to that the Court has also gone into the entirety of the judgment, both of the trial court as well as lower appellate court. Nothing glaring appears as an infirmity with the decision of the trial court. The lower appellate court has not held the findings and the judgment given on other issues so formulated in the suit to be in any manner erroneous or illegal. If the judgment held its field on the other aspects of the matter, merely because the lower

appellate court had come to an opinion that some additional issues are required to be formulated and answered, the judgment ought not to have set aside in entirety and remanded for fresh trial.

Contention of the counsel representing the respondents that these two issues are vital and were required to be answered and therefore, the order of remand was justified is an erroneous kind of submission in view of the ratio or law laid down by the Hon'ble Apex Court in the case of Ashwin Kumar K. Patel (supra).

The Court comes to a considered opinion that the lower appellate court has not shouldered its responsibility of deciding the appeal on its own merit, but has somehow remanded the matter for extraneous considerations, may be on an issue which was not even required to be answered or decided. If at all it was required to be decided, he had adequate powers to do so and the matter should not have been remanded back for a fresh trial as no major legal infirmity has been pointed out in the judgment or order of the lower appellate court viz-a-viz the trial court. The impugned order passed in Title Appeal No. 67 of 1991 dated 09.05.2005 is hereby quashed and set aside and the appeal allowed. The lower appellate court shall decide the appeal afresh.

Office is directed to dispatch the lower court records back to the court below forthwith.

(Ajay Kumar Tripathi, J.)

Dated: 06.07.2012
Patna High Court,
Patna
NAFR/
Shashi Kant Mishra/